

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

affidavit of filing

75-1133

To be argued by
ROBERT M. JUPITER

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-1133

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

JAMES ERNEST MANNING,
Defendant.

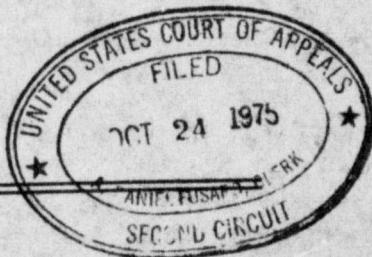
STUYVESANT INSURANCE COMPANY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLEE

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Appellee
United States of America.

ROBERT M. JUPITER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.



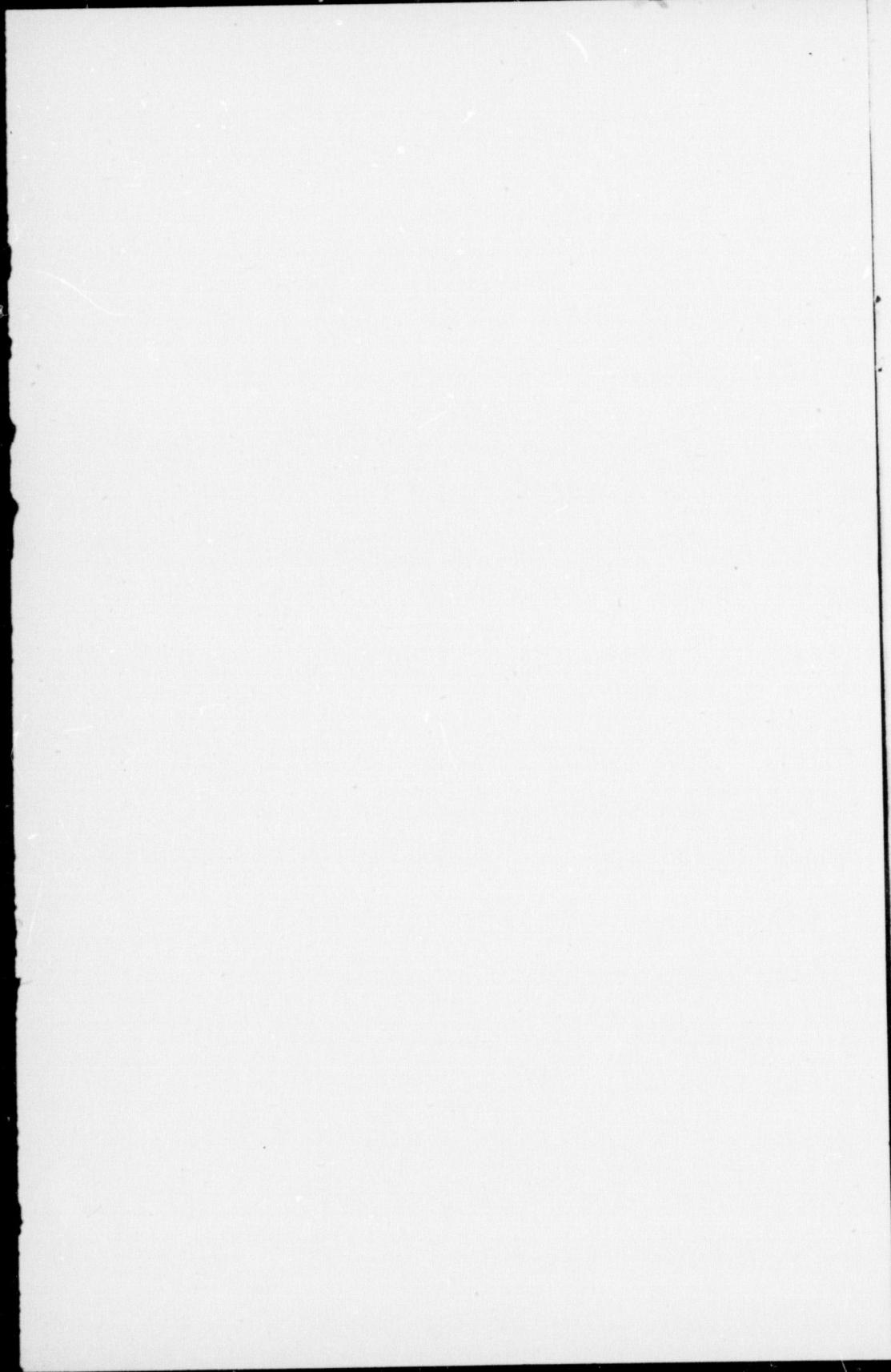


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
Rule Involved	5
Issue Presented	6
 ARGUMENT:	
The District Court did not abuse its discretion in finding that justice was served by forfeiture of the bail bond with a partial remission to the surety	6
Prejudice to the Government	8
Court Remitted \$2,000	9
CONCLUSION	9

TABLE OF AUTHORITIES

<i>Smith v. United States</i> , 357 F.2d 486 (5th Cir. 1966)	6
<i>United States v. Accardi</i> , 241 F. Supp. 119 (SDNY 1964), <i>aff'd sub nom United States v. Peerless Insurance Co.</i> , 343 F.2d 759 (2d Cir.), <i>cert. denied</i> , 382 U.S. 832 (1965)	7
<i>United States v. Agueci</i> , 379 F.2d 277 (2d Cir.), <i>cert. denied</i> , <i>sub nom Stuyvesant Insurance Co. v. United States</i> , 389 U.S. 897 (1967)	7
<i>United States v. D'Anna</i> , 487 F.2d 899 (6th Cir. 1973)	6

<i>United States v. Davis</i> , 202 F.2d 621 (7th Cir.), cert. denied, <i>sub nom Ferguson v. United States</i> , 345 U.S. 998 (1953)	6
<i>United States v. Egan</i> , 394 F.2d 262, 266-67 (2d Cir.), cert. denied 393 U.S. 838 (1968)	7
<i>United States v. Fook Dan Chin</i> , 304 F. Supp. 403 (SDNY 1969)	7, 8
<i>United States v. Foster</i> , 417 F.2d 1254 (7th Cir. 1969)	6
<i>United States v. Manning</i> , 448 F.2d 992 (2d Cir.), cert. denied, 404 U.S. 995 (1971)	4
<i>United States v. Nebbia</i> , 357 F.2d 303 (2d Cir. 1966)	6
<i>United States v. Public Service Mutual Insurance Co.</i> , 282 F.2d 771 (2d Cir. 1960)	8
<i>Williams v. United States</i> , 444 F.2d 742 (10th Cir.), cert. denied <i>sub nom United Bonding Insurance Co. v. United States</i> , 404 U.S. 938 (1971)	6, 7
<i>Rules</i>	
Rule 46(e), Federal Rules of Criminal Procedure ..	5

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1133

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

JAMES ERNEST MANNING,
Defendant.

STUYVESANT INSURANCE COMPANY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLEE

Preliminary Statement

The appellant Stuyvesant Insurance Company ("Stuyvesant") appeals from the decision and order (115a) * of the Honorable John M. Cannella, United States District Judge for the Southern District of New York, filed on March 11, 1975, remitting \$2,000.00 of the forfeiture of a bail bond in the amount of \$20,000.00 as to defendant, James Manning, who became a fugitive on the day set for his trial in the case of *United States of America v. James Manning et ano*, 69 Cr. 10 (S.D.N.Y.).

* Appendix references will be indicated by a number followed by the letter "a". Judge Cannella's opinion has not been officially reported.

Statement of Facts

A one count indictment 69 Cr. 10 was filed on January 3, 1969, charging James Ernest Manning and one other with concealing and transporting a large quantity of narcotics in violation of Title 21, Sections 173 and 174 United States Code.

On January 30, 1969, the defendant was arraigned and pleaded not guilty and was released on bail set at \$20,000. Bail was posted on behalf of the defendant by the Stuyvesant Insurance Company.*

Despite facts such as a failure of the defendant to ever put up collateral, Stuyvesant's agent made no attempt to surrender him at any court appearances prior to trial (50a, 61a-64a).

On May 12, 1969, this matter was scheduled to go to trial before Judge John M. Cannella, following reassignment of the case by Judge Motley to further a speedy trial (24a, 25a, 29a). On the day of trial, the defendant's attorney requested a delay and received an adjournment until May 13, 1969, the following day. The defendant who was present in court, was instructed to return for trial on that day (24a-30a).

* Stuyvesant's bond provided in relevant part that the defendant Manning is to appear ". . . at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court for the Southern District of New York.

". . . if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach . . ." (18a).

On May 13, 1969, Manning failed to appear for his scheduled trial (33a). A bench warrant was ordered (15a). The Government's application to forfeit bail was granted on May 16, 1969. However, execution of the order of forfeiture was stayed until May 29, 1969 (35a), to give the surety an opportunity to find and surrender the defendant. The defendant was not apprehended and the bail was directed to be forfeited (38a).

On June 4, 1969, Judge Cannella signed an order of forfeiture (39a).

Agents of the Bureau of Narcotics & Dangerous Drugs (the "BNDD") expended considerable time and effort to locate the fugitive (47a) during the approximately four months that he avoided capture.*

After a long and extensive search, (47a) and information from Stuyvesant's agent that Manning was coming and going at intervals to an apartment in the Bronx, the defendant was arrested on September 16, 1969, on the street near his known Bronx residence (72, 73a).**

* During this period of time the Bureau of Narcotics and Dangerous Drugs maintained vigil at various known haunts and places frequented by Mr. Manning. Stakeouts were established in the vicinity of Mr. Manning's residences, one of which was in Manhattan and another in the Bronx. It was learned that Mr. Manning had friends in Queens and these places were also kept under surveillance.

The Bureau of Narcotics and Dangerous Drugs communicated with other law enforcement agencies to inform them of Manning's fugitive status and to enlist their aid in his apprehension.

** After receiving information from Stuyvesant that Manning was at his apartment on the morning of September 16, it was necessary for deputy United States Marshals to go to this address where at first they were unsuccessful in apprehending the fugitive. However, they enlisted the assistance of yet another law enforcement agent and showed him a photograph of the fugitive. He was able to identify Manning as he attempted to flee the area and held the defendant at gun point until the United States Marshals returned and took him into custody.

Bail was now fixed in the amount of \$100,000 (16a) and the matter referred to trial.

The defendant's trial commenced October 9th, 1969, almost five months after the date previously set for trial. On October 14th, 1969, the jury returned a verdict of guilty (17a), which was ultimately upheld by the Court of Appeals, *United States v. Manning*, 448 F.2d 992 (2d Cir.), cert. denied, 404 U.S. 995 (1971).

On November 18, 1969, he was sentenced to imprisonment for a term of 12 years (17a).

On October 3, 1969, a motion was made for an order setting aside the forfeiture of the \$20,000 bail bond, pursuant to then Rule 46(f)(2) [now Rule 46(e)(2)] of the Federal Rules of Criminal Procedure (40a).

The motion to set aside the forfeiture of the bail bond was denied by Judge Cannella. A written decision dated November 20, 1969, and an order denying the motion was entered November 21, 1969 (49a).

Despite that order duly entered in the District Court for the Southern District of New York and demands duly made, the surety has never paid the sum called for in their undertaking, despite the passage of more than five years.

The government moved for judgment on the forfeiture and Stuyvesant cross-moved for remission. By opinion dated March 11, 1975, Judge Cannella granted a \$2000 remission of the \$20,000 forfeiture.

Rule Involved

Rule 46(e) of the Federal Rules of Criminal Procedure provides as follows:

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

Issue Presented

Did the District Court abuse its discretion in finding that justice was served by forfeiture of the bail bond with a partial remission to the surety?

ARGUMENT

The District Court did not abuse its discretion in finding that justice was served by forfeiture of the bail bond with a partial remission to the surety.

The purpose of bail is to assure the presence of a defendant at trial. *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966); *Smith v. United States*, 357 F.2d 486 (5th Cir. 1966). A bail bond is a contract between a surety and the government wherein the surety undertakes that the defendant will appear at any specified time and place required by the court, the failure of which results in forfeiture of the amount of the bond. *United States v. D'Anna*, 487 F.2d 899 (6th Cir. 1973); *Williams v. United States*, 444 F.2d 742 (10th Cir.), cert. denied, *sub nom, United States Insurance Co. v. United States*, 404 U.S. 939 (1971); *United States v. Foster*, 417 F.2d 1254, 1256 (7th Cir. 1969); *United States v. Davis*, 202 F.2d 621 (7th Cir.), cert. denied, *sub nom Ferguson v. United States*, 345 U.S. 998 (1953). In the present case, the bail bond was breached by Manning's failure to appear at trial and his continuing fugitive status for the four-month period until his arrest. Stuyvesant, as surety, thus became liable for the face amount of the bond.

Under Rule 46(e), Federal Rules of Criminal Procedure, a court may remit in whole or in part, or set aside, a forfeiture "upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

It is well established that any remission of a bail bond forfeiture is subject to the broad discretion of the district court. The standard of review is whether the district judge abused his discretion in determining the requirements of justice. *Williams v. United States, supra*; *United States v. Egan*, 394 F.2d 262, 266-67 (2d Cir.), cert. denied, 393 U.S. 838 (1968); *United States v. Agueci*, 379 F.2d 277 (2d Cir.), cert. denied, *sub nom*, *Stuyvesant Insurance Co. v. United States*, 389 U.S. 897 (1967); *United States v. Accardi*, 241 F. Supp. 119 (S.D.N.Y. 1964), aff'd *sub nom*, *United States v. Peerless Insurance Co.*, 343 F.2d 759 (2d Cir.), cert. denied, 382 U.S. 832 (1965); *United States v. Fook Dan Chin*, 304 F. Supp. 403 (S.D.N.Y. 1969).

The court here, in exercising its discretion, specifically applied the criteria set forth in *United States v. Fook Dan Chin, supra*:

In determining whether a remission is called for, the court must consider the amount of delay caused by the defendant's default, the expenses incurred by the government in attempting to locate and secure the presence of the defendant, the stage of the proceedings at the time of disappearance, and the relative efforts of the government and surety in attempting to locate the fugitive. *Id.*, 304 F. Supp. at 405-06.

See *United States v. Accardi, supra*.

In this case, the defendant did not appear for trial as scheduled,* and wilfully became a fugitive.

* The case had specifically been reassigned by Judge Motley to Judge Cannella to ensure a speedy trial and was adjourned at the request of Manning's counsel.

8

The only arguments which Stuyvesant now advances to upset Judge Canella's ruling are that the ultimate apprehension of Manning was due to information which they provided, and that the Government was not prejudiced by Manning's failure to appear. Both arguments must fail.

The court is simply not required to remit forfeiture, even where a surety's efforts resulted in the capture of a fugitive. *United States v. Public Service Mutual Insurance Co.*, 282 F.2d 771 (2d Cir. 1960); *United States v. Fook Dan Chin, supra*, 304 F. Supp. at 406.

It was only after four months of intensive searching by the government that Stuyvesant provided information which ultimately led to Manning's arrest.* The delay in trial, as well as the effort involved in attempting to locate the fugitive defendant, certainly constituted prejudice to the government, and indeed would have justified a total denial of Stuyvesant's motion for remission of forfeiture. See *United States v. Fook Dan Chin, supra*.

Prejudice to the Government

The surety's agent made no attempt to surrender Manning at earlier court appearances despite such factors as his failure to post collateral (50a). The court attempted to expedite trial, when Judge Motley reassigned the case to Judge Cannella (24a, 25a, 29a) and trial was adjourned only one day at the request of Manning's counsel (23a, 25a). Not only was the court inconvenienced by Manning's failure to appear, but witnesses had been summoned and a significant amount of time and effort had been expended by the prosecution in the preparation for trial. Ultimately, government resources which could have been put to better use were expended in attempting to locate Manning and in finally taking him into custody against his will.

* Contrary to Stuyvesant's allegations, they did not produce the fugitive. Rather, the information they provided was preliminary to his arrest at gunpoint during an attempt to flee.

Court Remitted \$2,000

The \$2000 remission ordered by Judge Cannella here was not only within the bounds of his discretion, but rather was generous. It is true that the surety here assisted in finding the fugitive defendant. Judge Cannella considered the assistance provided by the surety, finding that “[t]his information was nothing more than the fact that the defendant was at his apartment on the morning of September 16” (Opinion of Cannella, J., November 20, 1969, at p. 3) (51a). Stuyvesant expended between \$500 and \$1000 in the course of its efforts (74a). Judge Cannella in his decision found remission of \$2000 warranted as “such amount fairly represents the reasonable expenses incurred by the surety” (118a).

The district court clearly did not abuse its discretion.

CONCLUSION

For the foregoing reasons, the decision of the District Court granting a partial remission of \$2,000 and requiring the payment of \$18,000 on this bail forfeiture should be affirmed and the appellant be held to the contract it made as modified to its benefit by the court below.

Respectfully submitted,

October, 1975

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Appellee
United States of America.

ROBERT M. JUPITER,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

CA 75-1133

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 24th day of
October 1975 she served a copy of the within
brief
~~bixxxf~~ for the pltf appellee
by placing the same in a properly postpaid franked envelope
addressed:

M. Arthur Hammer, Esq.,
9 East 40th Street,
New York, NY 10016

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

24th day of October 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977

★ U. S. Government Printing Office 1975— 614—350—101